IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.854 OF 2004

1. Smt.Prachi Prakash Pandit
r/o. 44, Alaknanda, Gulmohar
Cros Road, JVPD, Mumbai - 400 049

2. Smt.Neena Vasant Tarkar
r/o. Revdanda, Taluka:Alibag
Dist.: Raigad

3. Shri Narendra V. Kulkarni
r/o. Income Tax Colony, E-16,
2nd floor, Peddar Road, Mumbai-26 ... Appellants

V/s.

1. Sou.Pushpa Sharad Ranade
r/o. 257/A, J.S.S. Road,
Girgaon, Mumbai - 400 004

2. Shri Ketan Vasant Tarkar
r/o. New Chandramahal, 1st
floor, Thakurdwar, Mumbai-4

3. Pallavi Narendra Kulkarni
Flat No.E-1, Income Tax Colony
G. Deshmukh Marg, Cumballa Hill
Mumbai - 400 0276 ... Respondents

Mr.Y.S. Jahagirdar i/b P.S. Dani for Appellants
Mr.Milind Vasudeo i/b M.G. Gawade for Respondent No.1
Mr.O.J. Menezes i/b P.P. Prabhu for Respondent Nos.2 & 3

A/W

APPEAL FROM ORDER NO.903 OF 2004

Smt.Pushpa Sharad Ranade
residing at Temple of Industry
257/A, J.S. Road, Girgaum
Mumbai - 400 004 ... Appellant

V/s.

1. Mrs.Prachi Prakash Pandit
r/o. 44, Alaknanda, Gulmohar
Cros Road, JVPD, Mumbai - 400 049

2. Smt.Neena Vasant Tarkar
r/o. Revdanda Bunder
Mukkam Post Revdanda

Tal.: Alibaug, Dist.: Raigad

3. Mr.Narendra Kulkarni
residing at Flat No.E-1, Income
Tax Colony, G. Peddar Road,
Mumbai - 400 026

4. Ketan Vasant Tarkar
New Chandra Mahal, 1st floor,
Thakurdwar, MUmbai - 400 002

5. Pallavi Narendra Kulkarni
Flat No.E-1, Income Tax Colony
G.Deshmukh Marg, Cumballa
Hill, Mumbai - 400 026 ... Respondents

Mr.Milind Vasudeo i/b M.G. Gawade for Appellants
Mr.Y.S. Jahagirdar i/b P.S. Dani for Respondent No.1
Mr.O.J. Menezes i/b P.P. Prabhu for Respondent Nos.4 & 5

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **DECEMBER 1, 2004**
JUDGMENT PRONOUNCED ON: **DECEMBER 23, 2004**

JUDGMENT:

. Both these Appeals challenge the order of the trial Court dated 9.9.2004. The appointment of a Court Receiver has been challenged in Appeal From Order No.854 of 2004. The refusal of injunction is impugned in Appeal From Order No.903 of 2004. Appellants in Appeal From Order No.854 of 2004 are Respondent Nos.1 to 3 in Appeal From Order No.903 of 2004. Respondent No.1 in Appeal From Order No.854 of 2004 is the Appellant in Appeal From Order No.903 of 2004. Respondent Nos.2 and 3 in Appeal From Order No.854 of 2004 are Respondent Nos.4 and 5 in Appeal From Order No.903 of 2004. For the sake of convenience the parties will be referred to

as arrayed in Appeal From Order No.854 of 2004.

2. One Anant Vishwanath Pilankar expired on 18.12.1988 leaving behind his sisters Neena Vasant Tarkar, Appellant No.2 in Appeal From Order No.854 of 2004 and Respondent No.2 in Appeal From Order No.903 of 2004 and Pushpa Sharad Ranade, Respondent No.1 in Appeal From Order No.854 of 2004 and Appellant in Appeal From Order No.903 of 2004. It appears that Anant expired leaving behind two wills dated 19.3.1984 and 24.7.1987 and a third will dated 17.1.2001. The Appellants in Appeal From Order No.854 of 2004 who are the executors of the will of the deceased dated 17.1.2001 have filed probate proceedings before the trial Court in which the impugned order came to be passed. Appellant No.3 is the son in law of Appellant No.2 Neena and the husband of Respondent No.3. Respondent Nos.2 and 3 are the children of Neena. Citations and notices have been issued. Respondent No.1 has filed her say to the probate application and has opposed the application. Respondent Nos.2 and 3 have no objection to the probate being granted in favour of the appellants. Respondent No.1 has also filed application at Ex.29 for an injunction and appointment of a Court Receiver in respect of the estate of Anant.

3. The main contention of the respondent No.1 in

opposing the application for probate and in the application for appointing of the Court Receiver and injunction is that the will is not valid and therefore it has to be presumed that Anant died intestate. She has an equal share alongwith her sister in the properties of Anant. According to Respondent No.1, the properties which include moveable and immoveable properties and a partnership concern known as Thakurdwar Brass Works are all in possession of the appellants and Respondent Nos.2 and 3. She contends that Thakurdwar Brass Works is a partnership concern where the original partners were Anant and Respondent No.2. This partnership concern is being run continuously even after the death of Anant by the executors and Respondent No.2. Agricultural lands according to Respondent No.1 consist of coconut and other fruit bearing trees all of which are in possession of Appellant No.2 and Respondent Nos.2 and 3. Other properties include residential premises and shares. Respondent No.1 claims that all these properties would be wasted and frittered away by the Appellants and Respondent Nos.2 and 3 during the pendency of the suit. According to her, the only way to protect the suit properties is by granting an injunction and appointing a Receiver in respect of the properties.

4. The trial Court has accepted the submissions made by Respondent No.1 and has appointed a Receiver

while refusing the prayer for an injunction. According to the trial Court, the will of Anant dated 17.1.2001 was not genuine, prima facie and therefore, no probate could be granted. In these circumstances, the trial Court was of the view that since both Neena and Pushpa, Appellant No.2 and Respondent No.1, respectively, would have equal shares in the property of their brother as it would be deemed that he had died intestate. Significantly, all the wills of Anant contain bequests to Neena and her children only. Pushpa has been excluded completely from the will. The trial Court while deciding the application has come to the conclusion that the last will being imperfect and inoperative by implication of law it would mean that Anant had died intestate. Furthermore, it has been observed that in the instant case there may not be any emergent damage or loss demanding immediate action nor was there any element of danger to the property. However, the trial Court has held it would be unreasonable to expect that in every case all the requirements contemplated for appointing a Court Receiver have to be examined or must exist. The trial Court also observed that although several grounds for appointing the Receiver had been made out in the application none of these grounds were pressed by the advocate for Respondent No.1 at the hearing of the application. Despite these findings and observations,

the trial Court has thought it fit to appoint a Court Receiver while refusing injunction.

5. Taking exception to the findings of the trial Court, the appellants have filed the present appeals. Mr.Jahagirdar, appearing for the appellants in Appeal from Order No.854 of 2004, submits that the trial Court has arrived at an erroneous conclusion that the will of 17.1.2001 was imperfect and that therefore Anant had died intestate. He submits that the trial Court had ignored the fact that the probate application was amended and in the alternate, the appellants had sought probate of the will of Anant dated 24.7.1987 which also excluded Pushpa. He submits that when the trial Court itself had observed that the property was not being wasted or damaged and that there was no eminent danger to the same there was no need to appoint a Court Receiver. He urges that by appointing a Court Receiver, no purpose would be served. Furthermore, according to the learned Counsel, appointment of a Receiver is always an extreme step which is to be taken only under certain conditions. He submits that the trial Court could at best have issued an injunction restraining the appellants from dealing with the property of Anant.

6. Mr.Vasudeo, learned Counsel appearing for the contesting Respondent No.1, submits that in fact the

trial Court ought to have granted the injunction, besides appointing the Court Receiver. He submits that till such time as the Court Receiver takes charge of the property it would be necessary to protect the same with an injunction. The learned Counsel submits that the appellants are illegally running the business known as Thakurdwar Brass Works by stepping into the shoes of Anant. The original partners were Ketan, that is Respondent No.2 and Anant. After the death of Anant, the appellants are running the same alongwith Ketan. According to Mr.Vasudeo, huge amounts have been siphoned off out of this partnership concern after the death of Anant. He, therefore, urges it is necessary to appoint the Court Receiver for partnership concern. As regards the agricultural land, the learned Counsel submits that there are fruit bearing trees on these lands and there is no account maintained regarding the produce nor is there any account maintained regarding the rent received from the tenants on the agricultural lands. Apart from this, certain other residential premises are in possession of the appellants and they are enjoying the same to the exclusion of Respondent No.1. In these circumstances, he urges that the Court Receiver appointed should not be disturbed and an injunction should also be granted in order that the properties are not dealt with prior to the Court Receiver taking charge.

7. Mr.Menezes, appearing for Respondent Nos.2 and 3, submits that the scope of a probate proceeding is very limited and the appointment of a Court Receiver is not contemplated in such proceedings. According to him, the Court while dealing with probate proceedings only has to ascertain whether the propounder of the will has executed it in accordance with law and whether the will is genuine. He places reliance on the judgments in *Baban Rambhau Jagdale v/s. Hanmant Rambhau Jagdale,* **2003(1) Mh.L.J. 113** and *Cotton Corporation of India Ltd. v/s. United Industrial Bank Ltd. & Ors.,* **(1983) 4 SCC 625**. Mr.Menezes further submitted that Respondent No.1 would at best be entitled to half share of the estate of Anant and therefore, she could not seek a Receiver in respect of the entire property.

8. At this stage, in my view, it would be appropriate to consider the case law cited at the bar. Mr.Vasudeo contends that a Receiver can always be appointed in a situation where the will is contested and the properties of the testator are being frittered away by the executor and/or the beneficiaries under the will. Mr.Vasudeo pointed out the judgment in *Pandurang Shamrao Laud v/s. Dwarkadas Kalliandas & Ors.*, **AIR 1933 BOM 342** in support of his contention. In this case, a learned Single Judge of this Court considered whether an

administrator should be appointed *pendente lite* in a testamentary suit. The learned Judge was of the view that position of an administrator pendente lite is similar to that of a Receiver. The distinction between the two is that the administrator pendente lite represents the estate of the deceased for all purposes except distribution. The learned Judge has observed that the Court must be satisfied of the necessity to appoint such an administrator and only then should the extreme step of appointing an Administrator should be taken. It is only where a bonafide dispute and the case of necessity is made out that the Court in its discretion could grant appointment of Receiver. Mr.Vasudeo submits that the Receiver appointed in the present proceedings is similar to the administrator appointed *pendete lite* and, therefore, no interference is called for. Reliance is also placed on the judgment of the Madras High Court in *Adapala Subba Reddy & anr. v/s. Adapala Andemma & Ors.,* **AIR (38) 1951 Madras 393** where the High Court has reiterated the view taken by this Court in the case of *Pandurang Shamrao Laud (supra*). The learned Counsel also relies on the judgment of the Gujarat High Court where the proceedings for grant of probate had become contentious on objections being raised as to whether the testator was in a disposing state of mind. The Gujarat High Court observed that in such a contentious proceeding under

section 295 of the Succession Act (39 of 1925) all the incidents of a suit will be concomitant to such a proceeding. A Division Bench of this Court by its order of 4.5.1998 in Notice of Motion No.1326 of 1997 in Suit No.1439 of 1997 has reversed the judgement of a Single Judge of this Court where the Single Judge had granted an injunction against the defendants from dealing with the suit property and had also directed the defendants to maintain account of the business conducted by them. The Division Bench was of the view that it was necessary to appoint the Court Receiver in order to protect the property which was being wasted.

9. The Calcutta High Court in the case of *In the Goods of Stanley Austin Cardigan Martin,* **AIR 1939 Calcutta 642** has held that when a proceeding for grant of letters of administration has been filed, a chartered High Court had inherent jurisdiction to grant injunction if a case was made out. The Court observed that in a proceeding for grant of letters of administration it cannot be said that there is any property in dispute. No question regarding title to property can be decided in such an application. According to this judgment, an application made for an injunction to be granted in such a proceeding does not fall within the scope of Order 39 Rule 1. However, the Court is not powerless to grant such an injunction if a proper case is made out. A

similar view has been taken by the Madras High Court in of *Namagir Ammal* v/s. *Subba Rao*, **AIR (36) 1949 Madras 45**. The Division Bench of this Court in the case of *Gabriel Santana Almedia v/s. Maria Felinta Viola Rodrigues & Ors.,* **Appeal No.280 of 1989 in Petition No.296 of 1985** has agreed with the observations made by the learned Single Judge in that case that a testamentary Court could not go into the question of title and/or possession between the parties and it would be for the parties to establish their respective claims in appropriate proceedings. Similarly, in the case of *Baban R. Jagdale (*supra), the learned Single Judge of this Court while considering the provisions of section 222 of Succession Act (Act of 1925) observed that it was not the duty of the probate Court to consider any issue as to the title of the testator to the property which is mentioned in the will. The Court is only called upon to determine whether the will is true or not.

10. Taking into consideration the entire conspectus of the case law cited before me, what emerges is that although a Receiver or an Administrator may be appointed by the Court he should not normally be appointed, unless the Court is of the view that the property is being wasted or that the estate of the deceased is being depleted and this extreme step is the only appropriate means to protect the property. The probate Court has

only to consider whether the will propounded is in accordance with law, genuine and can therefore, be probated.

11. In the present case, the trial Court has thought it fit to appoint a Receiver on the ground that the will of 17.1.2001 was not genuine, prima facie, and therefore, no probate could be granted and the property had to be protected. While doing so, the trial Court has ignored the fact that there was an earlier will which the appellants had sought to have probated. The submission of Mr.Vasudeo that since the last will of 2001 had revoked the earlier wills, only the last will was required to be considered, will have to be examined at the hearing of the suit. What is the effect of the last will, which Respondent No.1 claims to be fabricated, vis a vis the earlier wills will have to be considered by the trial Court at the hearing of the suit. However, admittedly, a probate has been sought not only of the will of 2001 but also of 1987. Prima facie Respondent No.1 cannot be permitted to approbate and reprobate by contending that the will of 2001 is not genuine, but it has the effect of revoking the earlier wills. The trial Court has held that the deceased Anant died intestate. On coming to the conclusion that the will of 2001 is not genuine, the trial Court has thought it fit to appoint a Receiver for the entire estate of

Anant. The finding of the trial Court that Anant had died intestate prima facie is not correct.

12. A Receiver or Administrator of the estate of the deceased person is to be appointed rarely and only under circumstances which are extreme. There is no evidence on record, prima facie, to indicate that the property is in grave danger of being wasted. Appointment of an Administrator or Receiver in respect of an estate would only deplete the estate as the charges of the Administrator or Receiver will have to be paid from the estate. In my view, no purpose would be served by appointing Receiver. The trial Court instead ought to have issued an injunction restraining the appellants and Respondent Nos.2 and 3 from dealing with the estate of the deceased. In my view, the immovable property can be adequately protected by granting an injunction. The partnership which the appellants claim to be continued may be directed to maintain accounts of the business conducted and to file in Court quarterly audited accounts. This will sufficiently protect the interest of Respondent No.1 Pushpa. The grievance of the Pushpa that huge amounts are being siphoned out of the partnership business by the Appellants can be taken care of in this manner.

13. In the result, the order of the trial Court is

set aside. The Appellants and Respondent Nos.2 and 3 are restrained by an order of injunction from disposing off or alienating or encumbering any of the assets mentioned in the probate proceedings or any other assets of the estate of the deceased Anant V. Pilankar. The Appellants and Respondent Nos.2 and 3 are also restrained from parting with possession and/or inducting any third party in respect of these properties.

14. The Appellants and Respondent Nos.2 and 3 shall maintain accounts of the business conducted in the name and style of Thakurdwar Brass Works and file a quarterly audited statement of accounts in the trial Court. They shall also maintain accounts of the agricultural produce and the rents received from the tenants on the agricultural lands. A quarterly statement of these accounts shall also be filed in the trial Court.

15. Both the Appeals are disposed of in the above terms. No order as to costs.

16. In view of the Appeals being disposed of, nothing survives in Civil Application Nos.1162 of 2004 and 1232 of 2004 and the same are disposed of accordingly.